JAKE LUMBER SDN. BHD.

v.

EMPLOYEES PROVIDENT FUND BOARD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[CRIMINAL APPEAL NO. K41-17 OF 1993]
20 DECEMBER 1994

PRACTICE & PROCEDURE*: Appeal - Section 16 A(1)(c) EPF Act 1951 - Failure to remit EPF contributions - Admission by appellant company - Fine paid - Court ordering appellant to pay arrears of contributions - Receivers and managers of appellant making part payment - Second Magistrate ordering settlement of balance of arrears - Whether order valid - Whether second Magistrate bound by decision in Chuah Teong Hooi & Anor. v. EPF Board - Whether receivers and managers liable to pay the arrears of contributions - Consideration of ss. 2, 16A(4), 17(1) & 18(2) of the EPF Act 1951.*

The appellant company was charged pursuant to s.16A(1)(c) of the Employees Provident Fund Act 1951 (the Act) for failure to remit an employee's contributions. The appellant pleaded guilty and paid the fine imposed. The appellant was also ordered to pay the arrears of contributions amounting to RM69,818 which was to be paid not later than 31 July 1990. On 3 August 1990 the receivers and managers of the appellant made part payment of RM8,299 arguing that they were not liable to pay the balance. The respondent applied to a second Magistrate for an order that the receivers and managers settle the balance of arrears which application was allowed. The appellant appealed on the grounds that the second Magistrate had erred in law by holding that she was bound by the case of *Chuah Teong Hooi & Anor. vs. EPF Board* [1990] 2 MLJ 218 which was distinguishable from the instant case and by ordering the receivers and managers to pay the balance of arrears when they were not the employer as defined by s. 8 of the Act.

Held:

[1] *Chuah's* case cannot be applied to the instant case because the learned Magistrate has no jurisdiction to give directions as to who should have priority or order the receivers and managers to pay in the absence of any provisions in the law conferring power on the Magistrate to do so. Therefore the learned Magistrate erred in law in holding that she is bound to follow *Chuah's* case when it is clearly distinguishable from the instant case.

[2] It is clear from s. 18(2) of the Act that any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer...of the body corporate...shall...be deemed to be guilty of that offence. Here the receivers and managers were appointed in December 1986, that is, after the offences had been committed by the appellant company. Therefore s.18(2) cannot be applied against the receivers and managers as they do not come within the ambit of the said section.

[3] The receivers and managers do not come within the meaning of the word "employer" in s.2 of the Act which *inter alia* means the person with whom an employee has entered into a contract of service or apprenticeship. Accordingly, the liability to pay arrears of contributions is a liability of the employer alone under s.16A(4) of the Act.

[4] Under s.16A(4) of the Act, the Court was under a statutory duty to order recovery of the arrears in the same manner as a fine which the first Magistrate has complied with. The

second Magistrate had no power to vary this order by ordering the receivers and managers to pay the balance of the arrears and it follows that the order made by the second Magistrate was a nullity.

[5] The appeal is allowed and the matter is remitted to the presiding Magistrate of the Court to exercise his discretion under s.283 of the Criminal Procedure Code whether to grant another period of extension for payment of the arrears or to issue a warrant for the levy of the amount by distress and sale after due inquiry.

Obiter Dictum:

When the period of time within which the instalments had to be paid expired, the balance outstanding was RM51,530. Since the order of the first Magistrate is valid, the EPF should have, if the second Magistrate was not so minded to grant another extension of time to the appellant to pay the arrears, requested the second Magistrate to issue a warrant under s. 283(i)(b)(3) of the Criminal Procedure Code for the levy of the amount by distress and sale of the property belonging to the appellant company and not requested the Court to order the receivers and managers to pay the balance. The EPF Board can also take a civil action *vide* s.17(1) of the Act which states that all contributions payable under the Act may without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

[Appeal allowed]

Cases referred to:
Chuah Teong Hooi & Anor v. Employees Provident Fund [1990] 2 MLJ 218 ***(dist)***
Global Pacific Textile Industries Sdn. Bhd. (In receivership) v. Ketua Pengarah Jabatan Kastam dan Eksais & Ors. [1994] 3 MLJ 175 ***(dist)***

Legislation referred to:
Employees Provident Fund Act 1951 (Rev. 1982), ss. 216A(1)(c), 16A(4), 17(1), 18(2)
Companies Act 1965, s. 292
Criminal Procedure Code, s. 283(i)(b)(3)
Subordinate Courts Act 1948, ss. 69 & 93(1)

For the appellant - Chan Wai Ling; M/s. Nicholas Fung, Tokuzip & Co.
For the respondent - Zahir Hussain bin Ahmad Shah, DPP

JUDGMENT

Tee Ah Sing JC:
In the Magistrates' Court the appellant, a limited company, was charged on three counts for failure to remit to the Employees Provident Fund (EPF) contributions as required by the Employees Provident Fund Act 1951 (Rev. 1982) ("the Act") in respect of an employee's wages for the months of April 1985 (the first charge), October 1985 (the second charge) and April 1986 (the third charge), all of which were offences under s. 16A(1)(c) of the Act.

On 16 May 1990 the appellant company through a representative pleaded guilty to all three charges and a fine of RM300 in default of payment of which a term of three months imprisonment was imposed on each charge. The fines were paid.

In addition, in the same proceedings, the appellant company was ordered to pay arrears of prescribed contributions amounting to RM69,818. The Court allowed this amount to be paid not later than 31 July 1990. The learned trial Magistrate was Cik Munizah Othman ("the first Magistrate").

On 1 September 1990 Court was informed that on 3 August 1990 the receivers and managers paid RM8,288 leaving balance of RM51,530 and Mr. Raymond Wong for the receivers and managers told the Court that they want to argue that they are not liable to pay the balance.

Mr. Norbett Yapp told the Court that the director is not personally liable.

On 19 September 1990 Miss Wong for the EPF submitted to the Court before Puan Caroline Bee Majanil ("the second Magistrate") that they would like to apply to the Court for a Court order to order the receivers and managers to settle the balance of arrears amounting to RM51,530.

Mr. Raymond Wong for the receivers and managers told the Court that the receivers and managers were appointed in December 1986 and that the assets of the company have been realised and they have paid out all the money and there is no money left, whereas in *Chuah Teong Hooi & Anor v. Employees Provident Fund* [1990] 2 MLJ 218 there are still sums of money to decide who gets priority. Learned Counsel therefore submitted that the receivers and managers are not liable to pay the balance of the arrears.

On 31 October 1990 the second Magistrate made an order ordering the receivers and managers of the appellant company to pay the said balance of contribution amounting to RM51,530 on or before 28 February 1991.

The grounds of appeal are:

1. The learned Magistrate erred in law by holding that she is bound to follow the case of *Chuah Teong Hooi & Anor. v. EPF Board* when that case is clearly distinguishable from the instant case.

2. The learned Magistrate erred in law by ordering the receivers and managers of appellant to pay the balance of the EPF contribution to the EPF Board when they are not employer as defined under s. 2 of the EPF Act.

3. The learned Magistrate erred in law by failing to appreciate the definition of prefential debts in s. 292, Companies Act 1965.

During the hearing of the appeal learned Counsel for the appellant abandoned ground 3 of the memorandum of appeal.

The issue is whether the order made by the second Magistrate on 31 October 1990 ordering the receivers and managers of the company to pay the balance of the arrears of prescribed contributions amounting to RM51,530 was valid.

Section 16A(4) of the Act reads as follows:

> Upon being found guilty of any offence under s. 16A(1)(c), the Court before which the employer is found guilty shall order such employer to pay to the Board the amount of any contributions, together with any interest credited thereon, due and payable to the Board and certified by the Accountant of the Board to be due from such employer, prior to the date of such finding of guilty and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under s. 426 of the Criminal Procedure Code.

In our instant case it was the appellant company that was charged for the offences in Court. There is no prosecution instituted against any officer of the appellant company for the offences read with s. 18(2) of the Act. Neither the receivers and managers charged for any offences under the Act.

Section 18(2) of the Act provides as follows:

> (2) Where an offence under this Act or any regulation or rule thereunder has been committed by a body corporate, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity shall, as well as such body corporate, firm, society or other body of persons be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstance.

Further it is clear from s. 18(2) of the Act that any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer..of the body corporate....shall ....be deemed to be guilty of that offence.

In our instant case from p. 12 of the record of appeal the receivers and managers were appointed in December 1986, that is, after the offences have been committed by the appellant company.

I am also the view that s. 18(2) of the Act cannot be applied against the receivers and managers as they do not come within the ambit of the said section.

"Employer" in s. 2 of the Act means the person with whom an employee has entered into a contract of service or apprenticeship and includes....

(c)....

The receivers and managers do not come within the meaning of the word "employer".

I am of the opinion that the liability to pay arrears of contributions which shall be recoverable as a fine is a liability of the employer alone under s. 16A(4) of the Act.

In the instant case the employer charged for the said offences is the appellant company not the receivers and managers. So the liability to pay the arrears of contribution lies on the appellant company alone.

In *Chuah Teong Hooi & Anor. v. Employees Provident Fund* [1990] 2 MLJ 218 the plaintiffs were the receivers and managers of two companies appointed pursuant to the provisions of the debentures in question. The companies were insolvent and unable to meet all their outstanding liabilities.

In view of the fact that the total proceeds of sale on realisation of the assets of the companies were less than the total costs and expenses incurred by plaintiffs, a direction of the Court was applied for as to the priority for payment between the claims of the Employees Provident Fund Board and plaintiffs' claim for receivership costs and expenses.

And at p. 220 His Lordship Wan Adnan stated:

> It is therefore my view that notwithstanding the provisions of the Companies Act 1965, the EPF claims take priority over the claims of the plaintiffs for their cost and expenses.

Chuah's case cannot be applied to our instant case because the Learned Magistrate has no jurisdiction to give directions as to who should have priority or order the receivers and managers to pay in the absence of any provisions in the law conferring power on the Magistrate to do so.

Similarly the case of *Global Pacific Textile Industries Sdn. Bhd. (In receivership) v. Ketua Pengarah Jabatan Kastam dan Eksais & Ors*. [1994] 3 MLJ 175 cannot be applied to the instant case. This is because in *Global pacific Textile Industries sdn. Bhd*, the plaintiffs who are the receivers and managers of a company applied to the High Court for declarations as to priorities between various claimants including EPF contribution. A Magistrate has no jurisdiction to grant declaratory decrees by virtue of ss. 69 & 93(1) of the Subordinate Courts Act 1948.

Therefore I agree with the submission of learned Counsel for the appellant that the learned Magistrate erred in law in holding that she is bound to follow the case of *Chuah Teong Hooi& Anor v. Employees Provident Fund Board* [1990] 2 MLJ 218 when that case is clearly distinguishable from the instant case.

Under s. 16A(4) of the Act the Court was under a statutory duty to order recovery of the arrears in the same manner as a fine.

This has been complied by the first Magistrate when she had on 16 May 1990 ordered the appellant company to pay the arrears of contribution amounting to RM69,818 not later than 31 July 1990. This order was correct and valid. I am of the view that the second Magistrate had no power to vary this order by ordering the receivers and managers to pay the balance of the arrears of contributions amounting to RM51,530. In view of the foregoing it follows that the order made by the second Magistrate on 31 October 1990 ordering the receivers and managers to pay the balance of the arrears of contributions was a nullity and I hereby set it aside.

When the period of time within which the instalments had to be paid expired, the balance outstanding was RM51,530. Since the order of the first Magistrate is valid, the EPF should have requested the incumbent Magistrate (the second Magistrate) to issue a warrant under s. 283(i)(b)(3) of the Criminal Procedure Code for the levy of the amount by distress and sale of the property belonging to the appellant company. And not requested the Court to order the receivers and managers to pay the balance. And if the incumbent Magistrate was not so minded after due enquiry to give another extension of time to the appellant company for the payment of the arrears. I am of the view that the EPF Board can also take a civil action *vide* s. 17(1) of the Act which states that all contributions payable under the Act may without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

In view of the aforesaid I hereby allow the appeal.

The second Magistrate who dealt with the matter under appeal has gone on transfer and I therefore remit the matter to whoever is the presiding Magistrate of the Court to exercise his discretion under s. 283 of the Criminal Procedure Code whether to grant another period of extension within which the appellant company may pay the arrears of contributions or to issue a warrant for the levy of the amount by distress and sale after due enquiry.